In the Supreme Court of the United States

October Term, 1969

No. 1399

Supreme Court, U.S.
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RICHARD M. BROUGH,

Petitioner,

vs.

THE BOARD OF EDUCATION OF MILLARD COUNTY SCHOOL DISTRICT, JACK NELSON, DELMA JEAN GALLI and GERALD B. HUFF, Members of the Board, and TALMAGE TAYLOR, Superintendent,

Respondents.

BRIEF IN
OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI
TO THE
SUPREME COURT OF UTAH

RESPONDENTS' BRIEF

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JURISDICTION AND STATUTE INVOLVED

The petitioner's claim that his right of free speech was violated by the School Board's action in ordering him to transfer from one school to another, at the same salary, and within the Millard County School District of Utah, was not raised by the pleadings, nor Motion for Summary Judment and was not considered by the courts below.

Petitioner refused to transfer, and after two lengthy Board hearings he was terminated for insubordination in October, 1967. There is no Teacher's Tenure Act in Utah outlining the requirements of procedural due process to conduct a fair hearing on termination. The complaint does not claim that any state statute is unconstitutional, nor does it specially set up any title, right or immunity claimed under the Constitution. 28 USCA Section 1257(3)

The appeal to the Utah Supreme Court was to reverse the Order of Summary Judgment in petitioner's favor. The State appellate decision reversed the trial court and ordered the School Board's Motion for Summary Judgment to be granted. The Board's Motion had been belatedly filed after the trial court had already issued its first Memorandum Decision and Summary Judment granting petitioner an order of reinstatement as a teacher and all lost salary. There has never been a trial, nor Findings of Fact. Respondent emphatically denies that petitioner was ordered to transfer because of a reprimand or sanction for speeches, remarks or newspaper articles made by petitioner.

THE QUESTION PRESENTED

Assuming that a trial had been held and that Findings had been made to support petitioner's statement of the case, the questions presented are: (1) Whether or not the school board was constitutionally barred from ordering the petitioner to transfer from one school to another in view of his expressed opposition to the federal aid to education program, and (2) whether or not the School Board's rules and regulations permitting termination of a tenured teacher for insubordination were unconstitutionally applied.

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Petitioner is contending that his right of free speech immunizes him from accepting a transfer from one school to another as ordered by the Board.

The Writ of Certiorari should be denied for failure to raise, preserve or pass upon the issue in the State courts below. *Cardinale v. Louisiana,* 394 U.S. 437. The question of the constitutionality of the School Board regulations was not raised below and hence is not open here. *Ellis v. Dixon,* 349 U.S. 458. Petitioner's first amendment rights and the application of the *Pickering v. Board of Education,* (391 U.S. 563) decision were raised for the first time by the Petition and Brief of Amicus Curiae, The American Civil Liberties Union, Utah Affiliate, In Support of Petition for Rehearing.

STATEMENT OF THE CASE

Plaintiff was a school teacher for nine years and was employed by the Board of Education of Millard County School District, for the school year 1967-1968. The rules and regulations of the Board gave plaintiff tenure in his employment.

Plaintiff was a representative to the Utah State Legislature and was an ardent and outspoken critic of the Federal Aid to Education Program. In October of 1967, difficulties and dissensions once again arose between plaintiff and his principal, Golden P. Wright, at the Millard High School in Fillmore, Utah, which caused the Superintendent of the School District, Talmage Taylor, to recommend to the Board of Education that plaintiff be transferred from Millard High School in Fillmore to a

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team-teaching position at the same salary at the Delta Junior High School in Delta, Utah. See affidavit of Talmage Taylor, R. 51-58.

Superintendent Taylor wrote to Mr. Brough on October 13, 1967, (R-7) explaining the reasons why Mr. Brough was requested to transfer. The affidavit of Superintendent Taylor (R-53) states that on the evening of the first Board meeting, October 12, 1967, Mr. Brough called the Superintendent at home after the Board meeting and said he had received word of the action of the Board of Education and that he would not teach at Delta Junior High School, but would resign. Due to Mr. Brough's verbal notification to Mr. Taylor that he would not report to teach at Delta (R-53), the Board of Education set a special Board meeting for Tuesday, October 17, 1967, at 10:00 a.m., and Mr. Brough was requested by letter to be at this meeting.

On October 16, 1967, attorney A. Lee Petersen wrote the following letter to Thorpe Waddingham, attorney for the defendant Board:

> Dear Thorpe:
>
> I am writing to you regarding the employment of Mr. Richard M. Brough as teacher at Millard High School. Mr. Brough went to school this morning at his normal time prepared to teach his classes, but was not allowed to do so. He was informed that another teacher was taking his place and to turn in his keys and other items belonging to the school.
>
> Since Mr. Brough is under contract to teach at Millard High School, he regards the above described action as a breach of contract by the Millard County

School District. Of course, Mr. Brough has not officially terminated his employment nor has his employment been terminated by the Millard County Board of Education. Therefore, he must assume that so long as he is ready and willing and able to teach at Millard High School, as agreed in his contract, his pay will continue.

Mr. Brough hereby gives notice to the fact that he is holding himself ready, willing and able to teach at Millard High School in full performance of his obigations under his contract with Millard County School District, and that he expects Millard County School District to likewise fulfill all of the specified obligations under that same contract.

Mr. Brough acknowledges receipt of a letter from Superintendent Talmage Taylor arbitrarily instructing him to appear in Delta, Utah, for a different teaching assignment on October 16, 1967, at 8:30 a.m. *Mr. Brough does not accept such a reassignment and takes the position that the summary manner in which it was issued is a violation of the terms of his employment.*

It is Mr. Brough's position that before any significant change in his teaching assignment is made, he is entitled a fair hearing with reasonable notice and time for preparation and to know in advance the names and addresses of all witnesses who will be called upon to give testimony adverse to him and the substance of any information expected to be taken from such witnesses.

Sincerely,

A. Lee Petersen

Attorney at Law

(emphasis added)

The subject of transfer of teachers is covered in the Board's Rules and Regulations as follows:

Section II-A

> 10. He (the Superintendent) shall assign all teachers to their schools, and make such changes in position as appear to be in the best interest of the schools. As far as possible, grade assignments will be made at the time contracts are issued. *He may change teachers from one school to another or from one grade to another as may seem advisable.*

Section III-D

> 4. *Transfers may be made at the request of the employees or upon the initiative of the Superintendent,* or other administrative officer for reasons which, in the judgment of the Superintendent, shall serve the best interest of the employee and/or the schools. All requests for transfer shall be made in writing.

After citing and relying upon the above provisions of the Rules and Regulations of the Board of Education, the opinion of the Utah Supreme Court states as follows:

> The plaintiff cites other regulations concerning dismissal for incompetency, but we consider them inapplicable to this fact situation.
> It is evident from the foregoing statutory authority and the rules and regulations of the defendant Board, all of which are part of the plaintiff's teaching contract, that he was obliged to accept a transfer when reasonably requested to do so, and that he would be guilty of insubordination upon such refusal. His contract was properly terminated for such refusal.[1]

1. [For an able exposition of the issue here involved, see *Board of Education of City of Los Angeles v. Swan,* 41 Cal. 2d 546, 261 P.2d 261.]

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Petitioner has been represented by four different attorneys throughout these proceedings. His first attorney, Mr. A. Lee Petersen, was County Attorney, and his steadfast position was that the Board could not *transfer* petitioner without a hearing in which petitioner would be entitled to (1) reasonable notice and time for preparation, and (2) to know in advance the names and addresses of all witnesses who will be called upon to give testimony adverse to him, and (3) the substance of any information expected to be taken from such witnesses. See letter of Attorney A. Lee Petersen, October 16, 1967, supra, which is attached to affidavit of Robert L. Steele, Clerk-Treasurer of the Board. In other words, Mr. Petersen was demanding a Bill of Particulars to conform to the practice with which he was familiar under Utah criminal procedure, to apply in a school board administrative matter.

The School Board hearing is governed by administrative procedure and not criminal procedure. These meetings were video-taped and the tapes were incorporated by reference into the Affidavit of Superintendent Taylor. (R-54) Attorney Petersen stated at the Board meetings that the hearing should be before a court reporter authorized to administer oaths and should be held in the evening in Fillmore, Utah (rather than Delta, the location of the School Board offices); that no charges could be presented against the petitioner based on hearsay evidence and that he should be given the opportunity to cross-examine all witnesses (R-55). This meant that the School Board would have been required to put petitioner's students under oath to testify against their teacher if it wished to prove its allegations that Mr. Brough was criticizing the School Board and the principal in his lectures to his class. The record below is

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clear that petitioner and his attorney thwarted the hearing before the Board by insistence on standards devised by County Attorney, A. Lee Petersen.

The opinion of the Utah Supreme Court notes that:

> Regulations concerning teacher tenure and the manner of his discharge are left to the boards of education by virtue of Section 53-6-20 U.C.A. 1953, as amended, which states in part: Every board of education . . . may do all things needful for the maintenance, prosperity and success of the schools, and the promotion of education; and may adopt by-laws and rules for its own procedure, and make and enforce all needful rules and regulations for the control and management of the public schools of the district.

Petitioner's Affidavit in support of his Motion for Summary Judment, made no allegation that the transfer was requested by the School Board as a sanction against his right of free speech. (R-36) The Petition for a Writ of Certiorari extensively argues that the reason for the requested transfer was to punish petitioner for his expression of opposition to Federal Aid Programs, *but this fundamental fact in the petition is not true, is denied by Respondent, and was never presented, pleaded or argued prior to the petition for rehearing filed in the Brief of Amicus Curiae.* Members of the School Board have stated that they thought that petitioner's viewpoint and opposition to Federal Aid Programs could be broadened and enlightened by engaging in a team-teaching method of instruction at Delta Junior High School. There were basic personality conflicts between petitioner and his principal (Golden P. Wright) that called for the transfer of petitioner in order that school

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could be taught without notorious dissension between petitioner and his principal and other school faculty at Millard High School. (R-52)

Petitioner was specifically asked by the president of the School Board at the meeting held October 27 why he was not willing to transfer to the Delta Junior High School and continue his campaign of opposing the School Board's acceptance of Federal Aid to Education. (R-54) Petitioner refused to consider this request, stating that he would not transfer until all reasons for the transfer were proved against him. (R. 55)

The Court will note that none of the newspaper articles or comments expressed by petitioner are contained in the record. We repeat, there was never any trial. When petitioner refused to transfer he was clearly guilty of insubordination, and the only course left open to the Board was to let petitioner teach where he demanded, or to enforce the Board's authority to administer. There was no claim made at the Board meetings or in the court proceedings below that the transfer was a form of punishment or reprisal against Mr. Brough's right of free speech. The petitioner was campaigning for reelection to the Utah Legislature and the Board of Education was not opposed to this, but Superintendent Taylor's Affidavit makes it clear that the dissension at Millard High School commenced in 1966 and continued for at least 18 months. (R-52) In all prior phases of this litigation, petitioner insisted that the Board had to prove: (1) some positive misconduct or dereliction of duty on his part before the Board was lawfully entitled to transfer him; (2) that the dissension at Millard High School was his fault rather than the principal's. Petitioner's Complaint pleads that plaintiff is ready, willing

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and able to continue his duties as a teacher (only) at *Millard High School* and that the plaintiff has for several years been one of the most successful, if not the most successful, teacher in the State of Utah in carrying out a speech and debate program. Petitioner's insistence upon formulating his own ground rules as to what constituted a fair hearing in order for the Board to be authorized to transfer him to Delta Junior High School is what caused the complete breakdown in procedure and evidenced his insubordination. The Utah Supreme Court reviewed all of the affidavits and letters pertaining to the Board meetings and concluded that petitioner had been given a fair hearing. The standards for fair hearing procedures were those set by common law to regulate a school board meeting. Petitioner's position has always remained the same. The Board could not TRANSFER him without a trial and a bill of particulars and sworn testimony from witnesses who could prove that he was the cause of dissension at Millard High School. Petitioner has never cited cases that this is the law. The claim made by petitioner was ridiculous. As an employee he was arguing that his emloyers could not prove that his conduct created friction, unrest and trouble to his employers to cause them to transfer him from one school to another. This was the crux of the case, and the Supreme Court of Utah cited only *Board of Education of City of Los Angeles vs. Swan,* 41 Cal. 2d 546, 261 P. 2d 261 as authority for its decision. This opinion by the Supreme Court of California completely sustains the action taken by respondent, Board of Education, in this case. Respondent also cited the following cases in support of its contention that, where state legislatures do not enact a Teachers' Tenure Act with specific provisions as to discharging a teacher for cause and what type of hearings must be afforded, the school boards, as an administrative elected body, may proceed in

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any reasonable fashion to discharge a teacher as long as a hearing is conducted which is not done in an arbitrary and capricious manner. *Anthony vs. Phoenix Union High School Dist., Maricopa County,* 55 Ariz. 265, 100 P. 2d 988; *Baird vs. School District No. 25, Fremont County,* 41 Wyo. 451, 287 P. 308; *Conley vs. Board of Education of City of New Britain,* 143 Conn. 488, 123 A. 2d 747; *Griggs vs. Board of Trustees of Merced Union H.S. Dist.,* 61 Cal. 2d 93, 389 P. 2d 722; *Kelsey vs. School Dist. No. 25,* 84 Mont. 453, 276 P. 26; *School Dist. No. 1 in Arapahoe County vs. Thompson,* 121 Colo. 275, 214 P. 2d 1020; *State ex rel Early vs. Wunderlich,* 144 Minn. 368, 175 N.W. 677; *Tracy vs. School District No. 22 of Sheridan County, Wyoming,* 70 Wyo. 1, 243 P. 2d 932, 70 Wyo. 22, 247 P. 2d 153.

This case has taken several different courses, and Respondent must emphasize that the facts contained in petitioner's brief are not true. There was never any pleadings, issue or trial that the reason for the transfer was to impose a *sanction* against petitioner's right of free speech. The trial court's Memorandum Decision was based on a finding that the Board of Education failed to follow its Rules and Regulations terminating a teacher for *incompetency.* The Supreme Court of Utah reversed the summary judgment in petitioner's favor, stating:

> The plaintiff cites other regulations concerning dismissal for incompetency, but we consider them inapplicable to this fact situation. (460 P.2d 338)

Petitioner's Brief for a Writ of Certiorari quotes from the Trial Court's Memorandum Decision at page 15, as though this applied to the present posture of the case. At the trial court level, the Motion for Summary Judgment was taken

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under advisement for five months, and then decided on a theory entirely different from the pleadings and affidavit, to wit, that the Board of Education had not followed the procedures that the Rules and Regulations prescribed for firing an incompetent teacher. The issue was whether or not petitioner was guilty of insubordination, not incompetency. The hearing procedures under the Rules were separate and different for these two types of conduct. There is no legal basis for The American Civil Liberties Union to now recite, as facts, what the trial court stated, after the trial court has been reversed; and such theory of termination for incompetency was not presented in the pleadings or in petitioner's Affidavit.

CONCLUSION

The Board Rules and Regulations do not provide for any hearing in order to request a transfer of a teacher from one school to another. Petitioner, a school teacher, and a member of the Utah Legislature demanded a hearing be held in the evening at his home town, with a court reporter and sworn witnesses and a bill of particulars in advance. He would not answer to the Superintendents and Board members' statements and explanation as to why he was requested to transfer, stating, "I have nothing to say until such time as there is a formal hearing wherein I have had the opportunity to present my evidence." (R-54)

If the Supreme Court should grant the writ to review in this case, the opinion could only order the matter tried to a fact finder to determine whether the requested transfer was a form of *punishment* for petitioner's expressed disagreements with federal aid programs. Respondent knows

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that this is not true, and that it could prove that sound reasons existed to request that petitioner be transferred to another school. Contrary to the assertion of petitioner that the order to transfer was a form of punishment, the Board made such transfer in order to eliminate the friction between petitioner and the superintendent and other members of the faculty at Millard High School which had resulted in a deterioration of the educational climate at Millard High School. The American Civil Liberties Union is distorting the record, by claiming that the Board's intent was to *punish* the petitioner. Petitioner thwarted the attempt to hold Board meetings and obtained a summary judgment on a theory of incompetency which was obviously not the pertinent issue. There was no trial or evidence to sustain the position now claimed by the American Civil Liberties Union. The Utah Supreme Court dealt with the case fairly and correctly. The petition for certiorari should be denied.

Respectfully submitted,

Thorpe Waddingham
Cannon Greene and Nebeker
Richard H. Nebeker